1965

State of Utah v. James Coleman : Brief of Respondent

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

STATE OF UTAH,
Plaintiff and Respondent,

vs.

JAMES COLEMAN,
Defendant and Appellant.

Case No.
10849

BRIEF OF RESPONDENT

Appeal from Judgment of the Seventh Judicial District Court in and for San Juan County, Utah, Honorable F. W. Keller, District Judge

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IN THE

SUPREME COURT

OF THE

STATE OF UTAH

STATE OF UTAH,
Plaintiff and Respondent,

vs.

JAMES COLEMAN,
Defendant and Appellant.

Case No. 10349

BRIEF OF RESPONDENT

STATEMENT OF THE KIND OF CASE

The appellant James Coleman appeals from a conviction for the crime of issuing a check against insufficient funds in violation of Section 76-20-11, Utah Code Annotated, 1953, in the Seventh Judicial District Court for San Juan County.

DISPOSITION IN LOWER COURT

The appellant was tried on the crime charged information on jury trial at Monticello, Utah, on the day of December, 1964. The jury returned a verdict guilty on that date. On January 19, 1965, the appellant was sentenced to be committed to the Utah State Prison but a stay of execution of the judgment was allowed until February 16. On February 16, 1965, the court denied motion for a new trial and ordered commitment to the Utah State Prison. Subsequently, on March 16, 1965, the court denied appellant's motion for reconsideration of the motion for new trial.

RELIEF SOUGHT ON APPEAL

The respondent submits the conviction should be affirmed.

STATEMENT OF FACTS

The respondent submits the following statement of facts:

The appellant called Richard Perkins, a stockman in San Juan County, Utah, and inquired whether or not he had cattle for sale (T. 5). This was on or about the 2nd day of February, 1964. Approximately the next day the appellant went to the home of Mr. Perkins in Blanding to examine the cattle (T. 5). After examining the cattle, the appellant called Mr. Perkins again by phone, and an agreed price on the sale of the cattle was reached (T. 6). It was agreed that the appellant would take 45 head of Mr. Per-

...cattle and pay Perkins the sum of $4,620, which sum ...ost a small amount for hay (T. 6, 7).

The cattle were loaded, branded, and inspected; and ...appellant gave Mr. Perkins a check in the amount of ...(Exhibit 1, T. 7). The appellant took the cattle, ...Mr. Perkins deposited the check with his bank in ...anding (T. 8). The check was apparently returned for ...a proper endorsement by the Fruita State Bank of ...Fruita, Colorado, upon which it was drawn. After redeposit ...check was returned because of insufficient funds (T. 8, ... Subsequently, Mr. Perkins contacted the appellant, and ...appellant said he would send a cashier's check, but ...did (T. 10). A letter (Exhibit 2), along with a ...dated May 16, 1964, was sent to Perkins. Perkins ...the bank concerning that check and was advised ...there was no account (T. 10).

Donald A. Turner, an employee of the Fruita State Bank of Fruita, Colorado, testified that the appellant opened a bank account at that bank on March 6, 1964, and deposited with the bank the sum of $5,800 (T. 43, 51). However, on that date, the appellant had approximately $5,000 worth of checks outstanding (T. 56). When the check given by appellant to Mr. Perkins was returned on March 12 to the Fruita State Bank, the appellant had on deposit only $2,691.69 (T. 56). At no time did the appellant satisfy the check. The appellant did not take the stand nor call any witnesses in his own behalf.

Based upon the above evidence, the appellant was convicted of the crime charged.

ARGUMENT

POINT I.

THE TRIAL COURT DID NOT COMMIT PREJUDICIAL ERROR IN REINSTRUCTING THE JURY SUBSEQUENT TO ITS RETIREMENT

The appellant contends that the trial court committed prejudicial error in instructing the jury when the jury subsequent to starting its deliberations, returned to request additional instructions (T. 67).[1] The foreman of the jury indicated the jury's desire to have Instruction No. 4 explained and to have certain questions concerning it answered.

Instruction No. 4 (R. 10) required the jury to find *beyond a reasonable doubt* that at the time of the making and delivery of the check from the appellant to Perkins the appellant had an intent to defraud, and passed the check knowing that at the time there was not sufficient funds or credit in the drawee bank for payment upon the check's presentation. The jury was expressly advised that the issuance of a check against insufficient funds was *prima facie* evidence of an intent to defraud "unless from all the evidence in the case [the jury entertained] a reasonable doubt as to whether [the defendant] had the intent to defraud at the time of making and delivering such check."

The court, upon return of the jury, instructed them concerning Instruction No. 4 and asked the jury if the

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[1]The respondent has no information as to how the pen marks appearing in the record came to be there, and respectfully submits that the court should disregard any inference that might have been intended by such markings.

"prima facie" bothered them (T. 68). The foreman of the jury indicated that they did not, but that the presumption issue was the question. The court then carefully explained the jury that presentation meant presentation to the bank, not to the payee, and that when the defendant delivered the check to the payee, he must know that he doesn't have money in the bank sufficient to pay the check upon its presentment to the bank (T. 68). Further, the court explained to the jury what prima facie means, indicating that it means only that the evidence creates a reasonable inference in the absence of proof to the contrary (T. 69). Finally, the court instructed the jury that evidence of lack of funds at the time the check is written raises a prima facie inference of an intent to defraud (T. 69).

Instruction No. 15, originally given by the court, admonished the jury to weigh the evidence fully in light of all the facts presented. Instruction No. 13 advised the jury that they had a right to consider "all the circumstances surrounding the occurrences referred to" in the case. Instruction No. 11 carefully advised the jury as to the meaning of reasonable doubt and the necessity of finding the accused's guilt beyond all reasonable doubt. The court also instructed on the presumption of innocence (Instruction No. 10) and specifically on the requirement of an intent to defraud (Instruction No. 3). The jury was also instructed that the State bore the burden of proving all the elements of the offense (Instruction No. 2).

At the time of the reinstruction to the jury, the only exception taken was that the court's reference to prima

facie, in the absence of an explanation that [illegible] could be considered, was error (T. 71). Finally, it should be noted that the court read the statute governing the offense to the jury, apparently without objection (T. 70).

At the time of the appellant's motion for [illegible] Judge Keller entered a Memorandum Decision in which he explained the basis of his instructions and why [illegible] new trial should be denied on a claim of instructional error (R. 25-3). Judge Keller wrote:

> "Without detailing the evidence respecting the account of the defendant with the Fruita State Bank upon which the check resulting in the charge in this case was drawn, it was disclosed in the evidence that at the time the check was first presented for payment the defendant had drawn other checks upon the same account which, together with the check upon which the charge is based, would have overdrawn the account by some two thousand dollars. It would seem to me that one may safely assume that this evidence was taken into account by the jury on the question of his intent at the time he drew the check. * * *"

It is submitted that, taking the instructions as a whole, the jury could not have been misled and no error was committed. It is well settled in this State that in considering whether the trial court has committed error in instructing the jury the instructions given should be considered as a whole. See *State* v. *McCoy*, 15 Utah 136, 49 Pac. 4[illegible] (1897); *State* v. *Hendricks*, 123 Utah 267, 258 P. 2d 4[illegible]; *State* v. *Evans*, 107 Utah 1, 151 P. 2d 196. In *State* v. *Sh[illegible]doway*, 61 Utah 189, 211 Pac. 968 (1922), this court noted

> "* * * When instructions as a whole fairly present the law, clearly present the issues involved, and contain no harmful or prejudicial errors, the verdict in a criminal case must stand. The statute that provides that technical errors in criminal cases shall be disregarded is mandatory, and, unless upon a review of all the evidence we are satisfied that a miscarriage of justice has resulted, we have no right to interfere with the jury's verdict. * * *"

It is submitted that when the instructions in the instant case are so viewed it cannot be claimed that the jury was misled.

It is well settled that references to burden of proof or the effect of prima facie evidence are not rendered prejudicial where other instructions make it clear that the jury is to consider all the facts and circumstances in the case. See 23A. C. J. S., *Criminal Law*, Sec. 1323, pp. 819-822. In *State* v. *Sawyer*, 54 U. 276, 182 P. 206 (1919), the appellant complained that an instruction on larceny phrased in the language of the statute on recent possession being prima facie evidence of guilt was error. This court rejected that contention, but noted that when the instructions given by the court were viewed as a whole, it was clear that the jury was given sufficient latitude to consider all the facts and circumstances in determining the appellant's guilt. In *State* v. *Donovan*, 77 U. 343, 294 P. 1108 (1931), an instruction similar to that given in the *Sawyer* case, relating to prima facie evidence of guilt, was claimed as error on appeal. The court stated:

> "* * * While the instruction in question stated that the unexplained possession of recently

> stolen property was prima facie evidence ... the statement was materially qualified, if not ... puted, by the further charge that such prima ... evidence did not relieve the state from pr... fendant's guilt beyond a reasonable doubt, ... such possession, even though unexplained, ... alone sufficient to warrant a conviction, ... such possession might be taken into consid... with other circumstances, etc."

A similar result was reached by this court in *State v. ...* 105 U. 162, 145 P. 2d 494 (1944). The court in the *S...* case made it clear that where the jury is otherwise ... as to the necessity of considering all the elements ... crime as against all the evidence presented, a referen... the term "prima facie" is not prejudicial.

It seems to be settled law in this State that where the trial court, as in the instant case, instructs the jury on the necessity of considering all the evidence, and where the instructions when taken as a whole make it clear that the court has not deprived the jury of considering relevant evidence in determining the accused's guilt, prejudicial error would not be found.

The appellant argues that the instructions as given by the court, in effect, deprived him of the defense of reasonable expectation of payment. It should be noted that the appellant made no request for such an instruction neither at the time of the original instructions to the jury nor at the time of reinstruction to the jury. It is apparent that the appellant's defense at the time of trial was based upon a claimed lack of intent to defraud. The reasonable expectation theory is only one means of challenging the

defraud. See 22 Am. Jur., *False Pretenses*, Sec. appellant did not request an instruction on the reasonable expectation of payment, but relied facts to vitiate the State's contention of an intent the argument now raised on appeal is extran- the posture of the case at the time of trial. The basis for the appellant's claim of prejudice would be the trial court's instruction had somehow advised the that the element of intent to defraud was no longer upon which reasonable men could differ. It is as that the jury was not confused on that issue, since questions were directed only to the issue of presenta-

It is apparent that the presentation issue was foremost the jury's mind in determining whether the appellant the requisite intent to defraud. It is well settled that appellant cannot seek to avoid his conviction by claiming at the time the check was written, he had sufficient money in the bank to cover it, if at the same time there were outstanding additional checks in excess of his bank balance. 22 Am. Jur., *False Pretenses*, Sec. 66, states:

> "* * * According to some authority, a statute making it criminal for a person, with intent to defraud, to draw or deliver to another a check on a bank, knowing at the time that he has not sufficient funds in, or credit with, the bank to meet the check, is violated by the giving of a check with money in the bank in excess of its amount, where the drawer has previously directed the bank to stop payment on all checks of a class including the check in question. * * *"

See also *Prince* v. *State*, 93 Texas Criminal [illegible] S. W. 863 (1923); *Huffman* v. *State*, 185 N. E. 131 [illegible] diana, 1933), where the courts sustained convictions [illegible] fact situations similar to that in the instant case.

When the instructions are examined as a whole, it [illegible] apparent that appellant has no basis on which to [illegible] error before this court. Further, it appears that the appellant is arguing a different theory of defense on appeal than that presented at the time of trial.

POINT II.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO GRANT A NEW TRIAL, SINCE:

A. THE MOTION WAS NOT TIMELY PRESENTED.

B. THE NEWLY DISCOVERED EVIDENCE WAS READILY AVAILABLE AND COULD HAVE BEEN PRESENTED AT TRIAL HAD DUE DILIGENCE BEEN EXERCISED.

Appellant contends that the trial court committed error in refusing to grant a motion for a new trial. There is no merit to this contention.

A. The record reflects that the jury's guilty verdict to the information as charged was returned on December 10, 1964. The appellant filed his own motion for a new trial on December 15, 1964 (R. 16). The motion requested a new trial on two grounds, one of which was newly discov-

...evidence. On January 19, 1965, the court entered its ...gment sentencing the appellant to the Utah State Prison, ...t stayed execution of the judgment until February 16, ...5. On February 16, 1965, the court heard the matter ...n motion for a new trial. The court denied the motion for ...new trial (R. 23). On March 16, 1965, the court denied ...same motion for a new trial having taken the matter ...reconsideration at the request of new counsel (R. 24). ...davits in support of the motion for a new trial were ...filed until March 16, 1965 (R. 20, 21).

Section 77-38-3(7), Utah Code Annotated, 1953, allows ...court to grant a motion for a new trial on the basis of ...ly discovered evidence material to the defendant's case ...ch could not have been discovered and produced at trial ...reasonable diligence. In the instant case, the motion ...s timely filed by the appellant within five days after the ...dict, as required by Section 77-38-4, Utah Code Anno-...ted, 1953. However, affidavits were not presented until ...rch 16, 1965. Section 77-38-3, Utah Code Annotated, ...3, requires that affidavits be produced at the hearing ...support of a motion for a new trial. Section 77-38-4, ...tah Code Annotated, 1953, requires that the affidavits be ...rved and filed within 30 days after the filing of the ...tice of motion. This was not done in the instant case. ...e court denied the motion for a new trial on February ...6, 1965. The court was well within legitimate bounds in ...nying the motion because of the failure of the appellant ...serve affidavits within the statutory period.

Having denied the motion on the 16th day of Febru-...y, 1965, the court was thereafter without jurisdiction

to reconsider the matter or to grant appellant a [illegible] tion for new trial. In *State* v. *Cano*, 64 U. 388, 231 P. [illegible] this court ruled that a second motion for a new trial [illegible] months after the time for filing the motion for a new trial has expired was properly denied. The motion in the present case, having been denied on February 16, 1965, could not be renewed by petition for reconsideration to be heard a substantial time thereafter. The court's Memorandum Decision (R. 25) reflects that counsel for the appellant had ample notice of the hearing on the motion for new trial set on February 16, 1965. The trial court in that Memorandum Decision doubted its power to reconsider the motion after having denied it and, thus, recognized the rule in the *Cano* case and the statement in *State* v. *White*, 107 U. 84, 152 P. 2d 80, where this court observed that a "second motion for a new trial was not timely made and the trial court was without jurisdiction to entertain it."

Based upon the above procedural irregularities, it is submitted the trial court properly rejected the motion for a new trial.

B. Appellant claims that the evidence alleged to have been newly discovered required the granting of a new trial. It is well settled that a motion for a new trial rests primarily in the sound discretion of the trial court. See *State* v. *Montgomery*, 37 U. 515, 109 P. 815 (1910). The trial court has had the opportunity to view the witnesses and appraise the evidence at first hand and, therefore, is in a much better position to determine whether the newly discovered

...idence is, in fact, newly discovered, and whether it would ...ave had a substantial effect on the jury's verdict.

In the instant case, it is submitted that the trial court ...d not abuse its discretion. The evidence which was said ...be newly discovered was a phone call made by the appel...nt to Mr. Robert Sawyer of the First National Bank of Durango, Colorado, to determine whether or not the check ...r $5,880, which was received by the appellant and de...sited in the Bank of Fruita, Colorado, would be good (R. ...). There is no question but that this evidence was read...y available at the time of trial. It is acknowledged in the affidavit of the appellant that he related the evidence of ...is conversation to his counsel prior to trial (R. 21). Cer...inly the appellant, who made the phone call, was well aware of having made the same and the contents thereof. Under these circumstances, it is apparent that this evidence is not newly discovered so as to warrant the granting of a new trial. In *State* v. *Weaver*, 78 U. 555, 6 P. 2d 167 (1931), this court noted:

> "Newly discovered evidence, to be ground for a new trial, must satisfy several elementary requirements. The courts are not in accord respecting all these requirements, but fairly agree that the newly discovered evidence be such as could not with reasonable diligence have been discovered and produced at the trial, that it be not merely cumulative, and that it be such as to render a different result probable on the retrial of the case."

In *State* v. *Moore*, 41 U. 247 (1912), this court denied ...e appellant's claim that a new trial should have been ...anted based upon newly discovered evidence where it

was clear that the evidence could have been ascertained the time of trial with reasonable diligence.

In *State* v. *Martinez*, 15 U. 2d 303, 392 P. 2d 39 (1964) this court, in denying that the trial court erred in failing to grant a new trial, observed:

> "There was no showing of newly discovered evidence on the question of insanity, which required a new trial. The evidence shows that the alienist now relied on for such evidence as to his sanity was the same one who was investigating defendant's sanity for the defendant's previous attorney, and there is no showing that the alienist made any new discoveries after the trial. * * *"

Finally, it is submitted that the claimed newly discovered evidence could have no effect upon the jury's verdict. The jury was well aware of the fact that there was no deposit the sum of $5,800 in the Fruita State Bank to the credit of the appellant at the time the check was first presented. The theory of the prosecution was that the defendant's intent to defraud was shown by the many outstanding checks in excess of the amount on deposit, and that the deposit, when viewed in the light of the claims against it was merely a ruse to cull subsequent persons inquiring into the matter into the belief that the appellant's motives were negligent, though honest. The evidence which the appellant claims to have been newly discovered would have added nothing to the posture of the case as it was submitted to the jury.

The trial court itself in its Memorandum Decision (R. 25) noted the fact that the evidence was hardly newly dis-

...red nor could have affected the jury's verdict. It is ...mitted that this conclusion is correct and that there is ... basis for a claim of error in denying the appellant a new ...al.

CONCLUSION

The appellant seeks reversal of his conviction because ... alleged instructional errors and failure of the trial court ... grant him a new trial. An analysis of these claims makes ... clear that they have no legal merit. The appellant's forum ... battle was the trial court. That was the place for a ... of this nature to be won or lost. The jury appeared ... convinced that the appellant acted in violation of the applicable law, and the appellant himself does not challenge ... sufficiency of the evidence upon which the jury's verdict was based. The errors claimed for reversal on appeal appear to have little relationship as to whether essential justice was done.

This court should affirm.

Respectfully submitted,

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Attorney for Respondent.